IN THE

Supreme Court of the United States.

No. 327.

HENRY J. ANTHONY, THOMAS R. PRICE, WILLIAM SMITH, COMMISSIONERS OF PICKENS COUNTY, PLAINTIFFS IN ERROR,

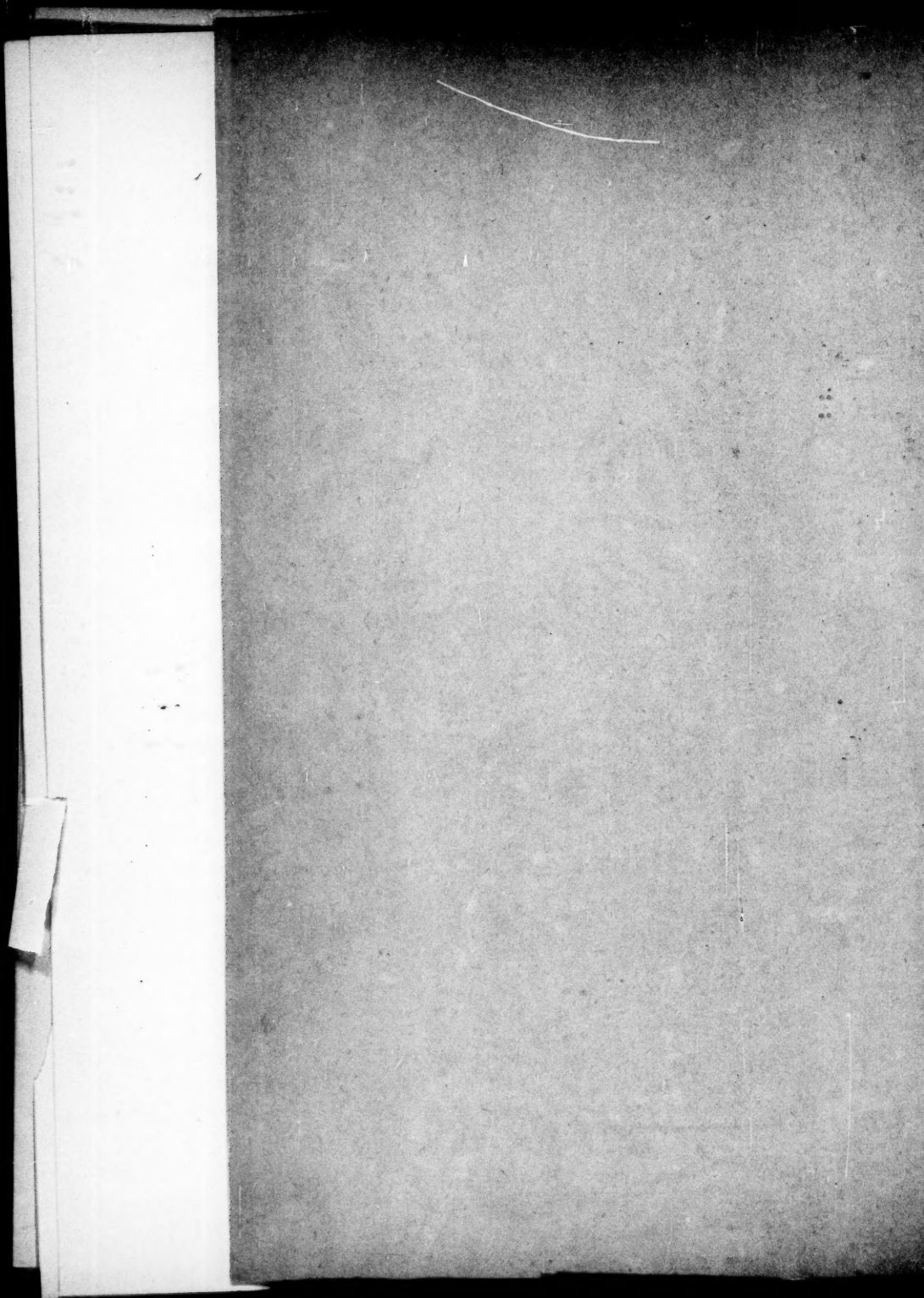
vs.

THE BANK OF COMMERCE OF RICHMOND, VIRGINIA, DEFENDANT IN ERROR.

BRIEF OF ARGUMENT.

W. E. EARLE,
For Defendant in Error.

CHARLESTON:
WALKER, EVANS & COGSWELL, PRINTERS,
Nos. 3 Broad and 109 East Bay Streets.
1878.



Argument of Mr. Earle.

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STATEMENT OF FACTS.

The statement in the transcript (p. 5,) that no evidence was introduced, needs explanation.

In pursuance of the Act of Congress, 17 Stat., 197, the Circuit Court of South Carolina, on the 24th of April, 1874, by rule adopted the practice of the State Courts.

By Section 191 of the Code of Procedure of S. C., (Rev. Stat.,) every material allegation of the complaint, not controverted by the answer as prescribed in Section 17 * * * shall for the purposes of the action be taken as true. But the allegation of new matter in an answer * * * is to be deemed controverted by the adverse party as upon a direct denial or avoidance as the case may require."

Section 172 above referred to is in these words:

The answer of the defendant must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief.

All the allegations of the complaint are, therefore, to testator as true, because there was no denial of them, as required by Sec. 172.

None of the allegations of the answer are to be taken as true, because under Section 191, they were traversed and not sustained by any evidence.

The only facts before the Court are, therefore, the facts alleged in the complaint, (Trans., p. 3.)

Error I.

The first assignment of error is, that the Court struck out the fourth paragraph of Defendant's answer. This paragraph reads: "That the signature of H. J. Anthony to the coupons of said bonds "was written by various persons, which coupons include those sued "for by the Plaintiff."

The Act of Congress of June, 1872, provides: The practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding. In pursuance of this Act the Circuit Court for the District of South Carolina on the 24th day of April, 1874, adopted an elaborate set of rules, 85 in number, prepared with great care, which "shall regulate all proceedings to be hereafter taken," the first of which reads as follows, to wit: "The practice, proceedings, "and forms of process in force on the first day of June, 1872, in the "Circuit Courts of this State, shall be of force in this Court as to all "matters to which they are applicable." By section 175 of the Code of Procedure of South Carolina, then of force, it is provided that "sham and irrelevant answers and defences may be stricken "out on motion, and upon such terms as the Court may in their dis-"cretion, impose."

Section 183 provides: "If irrelevant or redundant matter be in-"serted in a pleading, it may be stricken out, on motion of any per-"son aggrieved thereby."

It was under these regulations that the Circuit Court struck out paragraph IV of the answer. (Trans. Fol. 11.) Was that defense set up therein a good defense, if proven? Or was it sham and irrelevant?

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Section 172 provides that the answer shall contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counter claim * * *.

The fourth paragraph controverted no allegation of the complaint. Did it allege "any new matter constituting a defense or counter-claim?" It does not deny that the coupons were genuine. Nowhere in the answer is their genuineness doubted, and let it be here observed that the answer no where asserts a want of legal authority to issue these bonds and coupons. Paragraph two admits "that the "defendants, as County Commissioners of Pickens County, agreed to "issue one hundred thousand dollars of bonds in payment of the subscription," etc.

"The answer in paragraph III specifically admits that the Chairman and Clerk of the Board of County Commissioners "signed, "sealed and delivered said bonds, which are the ones referred to in the "first paragraph of plaintiff's complaint." Trans. fol. 10.

These being the admitted facts on the record, what matter was it that the signature of the chairman of the board was signed by various persons? It might not have been signed at all. It might have been printed, lithographed or otherwise.

The allegation contains no matter of defense, it is, "irrelevant "and redundant," and by law was obliged to be stricken out on motion of the plaintiff. It was stricken out and no exception was taken. Indeed but one exception was taken and that we shall hereafter consider, but we now submit that for all the purposes of this trial the plaintiff in error is held strictly to the assignment of error based upon an exception. It appears from the transcript that no evidence was introduced by either party. It is clear, therefore, that the defendant below did not offer to introduce any, as no exception is offered of a refusal. Section 191 of the Code provides that every material allegation of the complaint not controverted by answer "shall be taken as true." But the allegations of new matter in the answer "is to be deemed controverted (unless it relate to a counter "claim) by the adverse party as upon a direct denial or avoidance, "as the case may require." Clearly then every allegation of new matter in the answer was required by law to be established by the preponderance of evidence and none was offered by defendants (below) to establish it.

Not only is this true, but paragraph one of the answer reads:

That the statements of the complaint are true, except as modified by this answer. The only modifications are by allegations of new

matter, and since this new matter is deemed controverted as upon a direct denial or avoidance, the entire complaint of the plaintiff below stands not only uncontradicted, but admitted to be true.

The seventh assignment of error stands upon the same ground and need not be separately discussed.

Error II.

The second assignment of error is "that the Court refused to instruct the jury that the bonds, being signed by only one of the "County Commissioners, are void, and the coupons are therefore "void." The only prayer asked on the trial below is the one upon which this assignment rests. Is it valid?

The County Commissioners, Act of Sept., 26, 1868, (Statute at Large, volume 14, page 134, sec. 3,) provides that "a majority of "the board shall constitute a quorum for the transaction of busi-"ness." Hoping that one honest member might perchance be found on some boards, this Act was amended March 9th, 1871, (Statute at Large, volume 14, p. 662, Sec. 3) so as to read as follows: "That all the Board of County Commissioners shall be "present for the transaction of business, and shall audit and sign all "bills and checks. The checks shall, in all cases, be countersigned "by the clerk of the Board." Clearly this relates to the issuing of bills and checks on the County Treasurer in current business. It was a general provision. It was an amendment in terms, and expressly so stated, of the Act of September 26th, 1868. It was not an amendment of the special authority given by Act of September 18th, 1868, "to subscribe to the capital stock of the Air Line Rail-"road." Two days before the approval of the Act of March 9th, 1871, requiring the whole board "to audit and sign all bills and "checks." The Act was approved requiring the County Commissioners of Spartanburg, Greenville, *Pickens* and Oconee, "to have "levied and collected from year to year, on all taxable property in "such County, city or town, a sum of money sufficient to meet the "interest accruing on such bonds, * * * * and to provide for "the payment of such bonds as they may fall due."

In the face of this legislation the strained argument based upon the derivation of the word "bill" to prove that these bonds are "one species of bill," cannot receive serious consideration.

"To audit and sign all bills and checks"

The meaning of the amendment, from the connection in which it was adopted, is clearly "to audit all bills and sign all checks." Clearly the "bills" intended were *accounts*. The *bonds* to be issued to pay the subscription did not require "auditing." They were issued by a special authority to the Air Line Railroad.

But suppose this statute, which was a mere regulation to guard the acts of the County Board, did apply to these bonds, and that a proper and legal deference to the statute required the whole Board to sign these bonds, are they, therefore, void or invalid? Not at all. We beg the Court to bear in mind that it is not, and cannot be pretended that H. J. Anthony did not act in strict accordance with the direct authority of the entire Board. It is not, and cannot be denied that the full Board unanimously resolved to issue these bonds, and that H. J. Anthony acted with the full sanction of their authority.

Fol. 9 Pgh. II. That defendants, as County Commissioners of Pickens County, agreed to issue one hundred thousand dollars of bonds in payment of the subscription made by their predecessors in office for the said county, to the capital stock of the Atlanta and Richmond Air Line Railroad Company.

The objection by the plaintiff does not go to the extent of the authority and power to issue the bonds, but only to the manner of execution. The case does not stand on the ground of Marsh vs. Fulton County, (10 Wall.) where the Board did not have authority to issue, but only that Anthony alone should not have signed them. If the signature of all three be necessary, then the Board is guilty of laches or fraud, and it is not to be tolerated that they should take benefit from their own wrong, whether it was a casual omission or a deliberate fraud. The law is fully recognized as concisely laid down in Meyer vs. The City of Muscatine, (1 Wall, at 393,) "A party taking the bonds was bound to look to the legal authority under which the public agents acted. If they were sufficiently comprehensive, he had a right to presume that those empowered to act, and acting under it, had complied with its requirements," as laid down in Knox vs. Aspinwall, 21, Howard, 539, Mercer vs. Hacket, 1 Wall. 83. Paragraph I. of the complaint is as follows: That the Defendants (Plaintiffs in Error) are a corporation created by and under the laws of this State. By the code of South Carolina, all allegations of the complaint not specifically denied are admitted to be true.

The coupons in suit are the first of the series. The Defendants are bona fide holders of them (and were of the bonds,) for value. No fraud is alleged even, and certainly the Plaintiffs have shown no "fraud" in the origin or inception of the instruments to "throw "upon the holder the burden of showing that they gave value for "them." The agents acted, and does not this obligation to investigate end with the ascertainment of proper authority to act, or does it extend to the necessity of ascertaining that the power is executed with technical strictness in the mere matter of signing the bonds?

"The corporate seal attached to an instrument, attested by the "signature of the proper officers, is *prima facie* evidence that it was "lawfully placed there, and that the instrument is the act of the "corporation." 1 Dillon. Mun. Corp. Sec. 131

Abbott on Cors., page 725, Sec. 31, cites numerous authorities to same effect. The technical mode is the signature of the officer, in testimony whereof, the common seal of said corporation is hereunto affixed, and thereto affix the seal. Angell and Ames, Sec. 225.

In Glenn against the County Commissioners of York, *two* of the Board subscribed $100,000 to the Narrow Gauge Railroad, which was not chartered until February 26, 1873.

The objection was expressly made by counsel, but the subscription was sustained as legally valid and binding. VI South Carolina Reports, 436.

The record shows that an instruction was asked and refused, but does not show that an exception was taken to the refusal. That an exception must have been taken is plain law.

Walker vs. The United States, 9 Wheat., 657.

Phelps vs. Mayer, 15 How., 160.

Laher vs. Cooper, 7 Wall, 565.

Fashnacht vs. Frank, 23 Wall, 416.

But there was no evidence of the fact on which the ruling was asked, viz: That the bonds were signed by only one Commissioner.

The bond is not set out in the complaint, nor need it be.

Daniel on negotiable instruments, Page 459.

There was no proof offered by the defendant of the allegation in his answer on that point. (Trans. Fol. II.)

Error III.

"That the pleadings show that the defendants are not liable "as individuals on the coupons sued herein, and that they were sued "and the judgment so rendered against them."

The judgment is against the plaintiffs in their official capacity, and is virtually against the County of Pickens. Execution on it can only be against the County. The judgment therefore should not be reversed for the 3d error assigned.

If the judgment for this error cannot stand, then it is submitted that it should be modified so as to make it a judgment against the County of Pickens, which is what it is meant to be.

The verdict was correct and ought not to be disturbed, and it warrants a judgment against the County.

The verdict is in these words: "We find for the plaintiffs, $7,132.75." Trans., (fol. 11.)

This is by reasonable intendment a verdict against the County of Pickens. A verdict must be taken to be in conformity with the case made by the pleadings. and to be against the party before the Court. In this action the only case made was against the County, and the County was the real party before the Court.

1. The case made was against the County.

The cause of action averred in the complaint was the contract of the County of Pickens; the complaint contains no other cause of action. Under the rules of pleadings in South Carolina, the cause of action was sufficiently set forth to warrant a verdict against the County.

By Section 165 of the Code of Procedure, (Rev. Statutes, p. 604,) the complaint must contain a plain and concise statement of facts constituting a cause of action. By Section 185, the plaintiff in an action upon an instrument for the payment of money only, may give a copy of the instrument, and state that there is due to him from the adverse party a specified sum which he claims. By Section 298, the Court may grant any relief consistent with the case made in the complaint and embraced within the issue.

Under these rules the pleadings entitled the plaintiff to a judgment against the County.

2. The County of Pickens was the real party before the Court.

By Art 4, Sec 19 of the Constitution of South Carolina, the commissioners are made the officers of the County in its corporate capacity. There is no way in which suit can be brought against a County except by service of process on the commissioners.

The defendants below. (the plaintiffs here,) were the Commissioners of the County of Pickens.

The process served upon them designated them "Commissioners," (Trans. fol. 3). In the title of the complaint they are designated as "Commissioners." There is a decision of this Court directly in point on this question. In the case of the Commonwealth of Kentucky *vs.* William Denison, Governor of Ohio it was held that a suit against the Governor of a State, in his official capacity, is a suit against the State. Kentucky *vs.* Denison, 24 How., 66; Georgia *vs.* Madrazo. 1, Peters 110.

All was done by the plaintiff, which the law required, to bring the County of Pickens before the Court. When the defendants were served with the summons and complaint, in their official capacity, the County was in Court.

The corporate name of the County is nowhere expressly fixed by law.

The defendants below treated and defended the suit as one against the County. The answer was put in by the corporate

authorities of the County, and set up the defenses the County could make.

It contained no denial of the personal liability of the Commissioners because that was not understood to be in issue. It is submitted that the verdict was against the County of Pickens.

If the other errors assigned are overruled, then the verdict was correct and should stand and the proper judgment be entered upon it.

In Insurance Co. *vs.* Boykin, 12 Wall., 433, the verdict was allowed to stand and the judgment being reversed, the proper judgment on the verdict was certified to the Court below. The same course was pursued in Insurance Co. *vs.* Piaggio, 16 Wall., 378.

But the Supreme Court of South Carolina has decided the question: A judgment against the intendant and wardens, the town council of Yorkville, is good against the corporation of "The Town of Yorkville;" vide Eliza A. Neely *vs.* Wm. H. McCorkle, intendant, and John H. Schroeb and others, wardens, the Town Council of Yorkville. Mass. S. C. Reports.

This case is like one against two defendants in which there is a verdict as to one, and the judgment is entered on the verdict against the wrong defendant. It is, perhaps, more like the case in which a defendant is sued in his representative capacity, and the judgment is entered against him personally.

In these supposed cases the Court would direct the proper judgment to be entered.

So in this case the County of Pickens and the plaintiffs in error personally have been before the Court below and before this Court.

There has been a correct verdict against the County and a wrong judgment against the plaintiffs personally.

This mistake the Court can, under the power given by Section 701, Revised Statutes, permit to be corrected.

Errors IV and VI.

"That the County of Pickens could not be authorized, under "the Constitution of South Carolina, or the Legislature, to create the "obligation which the coupons sued on purports to have created."

"That the act of September 18, 1868, is void as forbidden by "the State Constitution, violating sections thereof, to wit: Sec. 20 "of Art. II, and Sec. 8 of Art. IX, hereafter set forth."

Undoubtedly the authority of municipal corporations to make railroad subscriptions are purely statutory, and must not be obnoxious to the organic law.

Argument of Mr. Earle.

It is argued that Art. IX, Sec 8 of the State Constitution of South Carolina provides that the corporate authorities of counties may be vested with power to assess and collect taxes for corporate purposes, and is a limitation on the power of the Legislature. To sustain this position Howard *vs* Drainage Co, 51 Ill., 130, is cited as deciding under a similar clause, "to limit taxation by municipalities "to local or corporate purposes" The quotation is not from the decision, but from Mr. Dillon, and he is mistaken as to the point decided by the Supreme Court of Illinois. A reading of the decision will show that the true point decided was that the county could not be made to contract a debt against its consent, and that the clause referred to restricted "the Legislature from granting right of local "corporate taxation to any other than the corporate authorities of "the municipality or district taxed." The case referred to by my *friend* is in 51 Illinois, 130, (not 57 vol.) It is also referred to by Mr. Dillon in Sec. 43, and this last reference shows that the argument drawn from it is erroneous. The case itself shows plainly that the power of taxation given to this drainage company was in conflict with the Constitution. The drainage company could not be empowered to levy a tax, though the corporate authorities of the county could be. The same principle was settled in the case of the Lincoln Park Commissioners, who were authorized by the Legislature to contract debts for which the city authorities of Chicago were to issue bonds. The Court held that these Commissioners "were "not the corporate authorities of the city," and therefore, could not be empowered to contract a debt for it, on the same constitutional grounds. Vide same volume, page 17. This Court has decided in Thompson *vs.* Lee County, 3 Wallace, 397, that "the Legislature of "a State, unless restrained by the organic law, has the right to "authorize a municipal corporation to take stock in a railroad or "other work of internal improvement, to borrow money to pay for "it, and to levy a tax to repay the loan." It is sufficient, therefore, to say that there is no restraining provision in the Constitution of South Carolina But the Constitutional warrant of this act stands upon higher grounds. Railways, along with canals and turnpikes, are classified as "public highways." In South Carolina, vide R. S., Chapter 63, Sec. 75, and Sec. 19 of Art. IV of the State Constitution is as follows, to wit:

"The qualified electors of each county shall elect three persons for "the term of two years, who shall constitute a Board of County "Commissioners, which shall have jurisdiction over roads, highways, "fences, bridges, and in all matters relating to taxes, disbursements "of money for county purposes, and in every other case that may be "necessary to the internal improvement and local concerns of the

"respective counties, provided: That in all cases there shall be the "right of appeal to the State Courts." Here then is a distinct grant of authority in the Constitution for the power given in the acts designated in argument as acts of September 18, 1868, and of March 7, 1871, and though no act of Assembly had defined "the powers and duties of the Board of County Commissioners," (this not having been enacted until the 26th of September, 186-,) when the power to subscribe to this railroad was given on the 18th of September, 1868; yet here is the Constitutional provision for such Board and the chart of its powers. We are not left to mere surmise on this subject. A section in another charter, "a literal copy, *mutatis mutandis* of Sec- "tion 1 of the act of September 18, 1868," was fully considered and construed in the light of this section of the Constitution, and of Chapter 63, Sec. 75 of the Revised Statutes by the Supreme Court of South Carolina in the case of Glenn *vs.* County Commissioners of York County, and that Court simply concurred in the learned opinion of the Circuit Judge, and dismissed the appeal.

The Circuit Judge expressly decides that this power of the County Commissioners is constitutional, and his decree being adopted by the Supreme Court is a construction of this Statute and a decision in favor of its constitutionality by the highest judicial tribunal of the State and will be adopted by this Court.

This Court too in Rogers *vs.* Burlington, 3 Wall., 663, speaks of Railways "as in the nature of improved highways."

And in Olcott *vs.* Fon-du Lac, 16 Wall., 678, says: 'That rail- "roads are public highways has been the doctrine of nearly all the "Courts ever since such conveniences have had any existence. It "is said that railroads are not public highways per se. That is a "mistake. In their very nature they are public highways. It "needed no decisions of Courts to make them such."

It is argued further that the Act of 18th of September, 1868, is obnoxious to the objection that its subject is not sufficiently expressed in its title. It may be, but this Court would hardly hold so upon the authorities quoted. The obnoxious Act in the People *vs.* Hill, 35 N. Y., was entitled "an Act to amend Chapter 389 of the laws "of 1851." The chapter is the consolidation of the "several Acts relating to the City of Rochester" and contained 282 sections. One whereof authorized the city to nominate one director in a certain railroad on certain conditions. The obnoxious amendment, the title of which is quoted, gave it the right to nominate *seven*. The purpose was hidden. Comment is unnecessary.

In the People vs. O'Brien, 38 N. Y., an Act to raise money by tax, and to provide for the auditing and payment of unsettled claims, contained a provision for extending the term of election.

It was clearly an amendment to "An Act to incorporate this railroad," that it should be empowered to receive subscriptions from any county, town or city, to be paid in such manner as "the proper "authorities thereof shall deem best, determined and authorized."

But if this Act is really obnoxious to this objection, the authority to make the subscription and issue bonds to pay, it is in the Act of March 7th, 1871, hereinafter quoted, and which was enacted prior to the subscription. And to the Act of March 7th, 1871, no such objection is or can be made.

ERROR V.

"That the Legislature of South Carolina has not authorized "the County of Pickens to issue bonds in payment of subscription to "the capital stock of the Atlanta & Richmond Air Line Railway "Company."

Municipal corporations being the creatures of legislative will, it is fully admitted, that the power to subscribe to the capital stock, of a railroad and to make a bonded debt, must be found in positive legislative enactment.

It is objected to the authority in this case that the Act of September 18th, 1868, is repealed constructively by the Act of 26th of same month. It is further objected "that the right to create "debt implied necessarily the right to provide for its payment by "taxation. the highest exercise of power known," and that "when the Act (18th September, 1868.) was passed, there were no proper authorities to execute this power." This statement is strained. It is true there were no County Commissioners. They are not the only designation for proper authorities, and the reports of this Court are replete with the evidence that townships and other unincorporated territorial sub-divisions may issue bonds and valid ones by legislative authority. Both these objections however, are fully met by the Act of Assembly of March 7th, 1871, Stat. at Large, (Stat. of South Carolina) for 1873, p. 595, which is entitled, "An Act to "authorize the County Commissioners of Spartanburg Greenville, "*Pickens* and Oconee and the authorities of certain towns in those "Counties, to provide means to meet interest on certain bonds" which reads as follows:

SECTION 1. "Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by authority of the same, That the County Commissioners of the Counties of Spartanburg, Greenville, Pickens and Oconee, and the proper authorities of the several cities and towns in those Counties having subscribed, *or proposing subscription, to the capital stock of Atlanta & Richmond Air Line Railway Com-*

pany, be empowered, as *soon* as the said Railway Company shall have complied with the terms of subscription of any one of the above mentioned Counties, cities or towns, and said subscription shall have been accepted by said Company, then the *County Commissioners* of such County, or the proper authority of such city or town, *are authorized and required to have levied* and *collected*, from year to year, on all taxable property in such County, city or town, a *sum of money sufficient* to meet the interest accruing on such bonds as may be issued to meet such subscription to the capital stock of the said Atlanta & Richmond Air Line Railroad Company, and to provide for the payment of such bonds as they may fall due." Notwithstanding the bonds recite upon their face that they are issued "in pursuance of the *acts* of the General Assembly," this important one seems to have been wholly ignored, though enacted prior to the date of the bonds.

Here then is a plain and specific statute, making it the duty of the County Commissioners of Pickens County to have levied and collected, from year to year, a sum sufficient to meet the interest accruing on these bonds, issued, as the pleadings admit they were, to meet the subscription to this railroad. They have not done so, and judgment has properly gone against them, and the elaborate argument of counsel falls heavily to the ground.

W E Earle.